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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.

5 v. 14 Cr. 534 (JSR)

6 HARVEY NEWKIRK,

7 Defendant.
-----x

8 June 12, 2015
9 4:15 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

18 BY: ANDREW C. ADAMS
Assistant United States Attorney

19 LAW OFFICES OF PRIYA CHAUDHRY

20 Attorney for Defendant

BY: PRIYA CHAUDHRY

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1 (Case called)

2 MR. ADAMS: Good afternoon, your Honor. Andrew Adams
3 for the United States.

4 THE COURT: Good afternoon.

5 MS. CHAUDHRY: Good afternoon, your Honor. Priya
6 Chaudhry for Mr. Newkirk, who is present and standing to my
7 right.

8 THE COURT: Good afternoon. Please be seated.

9 The only motion that was filed was a request for a
10 bill of particulars, which the government opposes, and I'm not
11 quite sure why it opposes all of the bill of particulars. The
12 response of the government is, oh, we have given you tons of
13 information, go fish. Why should the defense have to go fish?
14 I'm sorry. Did you want to say something?

15 MR. ADAMS: Not to interrupt your Honor, I'm sorry.

16 THE COURT: Let's start with the ones that I think are
17 quite colorable.

18 Request number 3, "Please specify the date on which
19 the government believes Mr. Newkirk joined the conspiracy."

20 What's the problem with providing that?

21 MR. ADAMS: Your Honor, I think that the issue is just
22 providing it in the form of a bill of particulars. It is
23 alleged in the indictment on or about August 2013, so I would
24 say around August 1 or thereabouts is what we would be --

25 THE COURT: So to the extent that this information was

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1 already with the defense in one form or another, I don't
2 understand why you didn't just say, okay, it is the second time
3 we are telling you, in effect, but here is a one-sentence
4 answer, and it would be a three-word answer, on or about blank
5 blank blank.

6 MR. ADAMS: Your Honor, just to clarify the position,
7 rather than hemming ourselves in in the way a bill of
8 particulars might --

9 THE COURT: That's what they are trying to do. That
10 is, of course, the strategic advantage to them and the
11 strategic disadvantage to the government. And as to some of
12 these requests, I think that is more than adequate. But it is
13 not adequate to things like when the defendant joined the
14 conspiracy, because that is critical to objections that this
15 court will have to rule on as to whether statements come in or
16 not into evidence on hearsay grounds and on other grounds. So
17 the defense counsel needs that, needs it in a reasonably
18 binding way in order to prepare her defense. You can say it,
19 just like you just said it, which is on or about, but that
20 means the date that you then give will have a leeway, say, of a
21 week or two in either direction, but not months in either
22 direction. So number 3 is granted.

23 MR. ADAMS: Your Honor I would just also say, as we
24 are going through this, just to sort of flesh out the record,
25 one thing that is not really mentioned, other than in quoting

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1 my response, Mr. Newkirk has received two different reverse
2 proffers. This is not a case where we have been cagey in any
3 way. I have sent document after document.

4 THE COURT: I am not suggesting you are being cagey.
5 You identified the exact issue. The point of a bill of
6 particulars in this kind of circumstance, when there has been
7 discovery and now I know about the proffers as well, is to pin
8 the government down. The government has a natural desire not
9 to be pinned down. The defense has a natural desire to pin you
10 in every way possible. But from a judge's standpoint, some
11 pinnings are appropriate because they bear on rulings the court
12 will have to make, and other pinnings are not. So that's
13 really where we are at.

14 MR. ADAMS: Thank you, sir.

15 THE COURT: With respect to number 4, "Please identify
16 all other conspirators and the dates on which they joined the
17 conspiracy," that is also granted.

18 Those were the only ones that seemed to me to be
19 necessary for the purposes I have just outlined, but if the
20 defense wants to argue on behalf of the remaining particulars,
21 I will hear it.

22 MS. CHAUDHRY: Thank you, your Honor.

23 The first two were actually sort of the same request,
24 which is what is their theory of prosecution, what was the goal
25 of the scheme. And I asked this not to harass Mr. Adams,

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1 because I have asked him a few times, but I asked this because
2 genuinely, having reviewed the indictment, going through the
3 discovery, having had the benefit -- and thank you again -- of
4 the reverse proffer, it is not clear what the government is
5 alleging the actual goal of this conspiracy was.

6 THE COURT: Maybe it was my misunderstanding of your
7 request. All the government needs to prove to prove mail fraud
8 and wire fraud is that there was a scheme to obtain money or
9 property by means of false or fraudulent pretenses,
10 representations, or promises. So it sounded like you wanted
11 something beyond that. The object of the scheme, of a mail
12 fraud scheme, is to cheat someone else out of money. That's in
13 the normal course. This is not a 1346, honest services case.

14 MS. CHAUDHRY: My question was permanently? That's
15 the question. Are they saying he was trying to cheat people
16 out of their money permanently?

17 THE COURT: What does that matter? If I make false
18 representations to you so that you will give me some money now
19 and I intend and maybe do pay it back a month later, I have
20 committed all of the elements of mail and wire fraud assuming I
21 used the mails or the interstate wires.

22 MS. CHAUDHRY: Right. The distinction here is the
23 allegation, as I understand it, is that a group of people was
24 brought together to try to buy *Maxim Magazine*. Those people
25 gave money to try to buy *Maxim Magazine*, and the sale didn't

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1 end up going through. So I think what I am trying to
2 understand --

3 THE COURT: It doesn't matter whether the sale went
4 through. The question is, did they give their money on the
5 basis of misrepresentations or not?

6 MS. CHAUDHRY: Right. So my question is what is the
7 misrepresentation?

8 THE COURT: Intent, etc.

9 MS. CHAUDHRY: I guess my question -- and you will
10 tell me if you disagree -- is was the misrepresentation that we
11 are trying to buy *Maxim Magazine* or something else?

12 THE COURT: We will get to representations in a
13 minute. But, 1, the way you worded it was, Please specify the
14 object of the magazine scheme. So 1 is denied, and 2 is also
15 denied. 3 and 4 have been granted. I think you are referring
16 to 6six, "Please identify all false statements allegedly made
17 by Mr. Newkirk; and, for each statement, please specify the
18 date of the statement, to whom the statement was made, and what
19 was false about the statement."

20 I certainly understand why you would want that, but I
21 think that is a level of evidentiary detail that is not
22 normally appropriate for a bill of particulars.

23 Remind me, because I haven't gone back and read the
24 indictment. What does the indictment say? Were the false
25 representations?

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1 MR. ADAMS: There are a number of false
2 representations laid out in detail in the indictment. There
3 are a number of e-mails specifically referenced in the
4 indictment as well as in the proffers that we have.

5 THE COURT: I see why you would want number 6, but I
6 don't need to know that to make rulings.

7 MS. CHAUDHRY: To me, the case looks different under
8 two scenarios.

9 We will take scenario one, that the misrepresentation
10 is we are actually trying to buy *Maxim Magazine*. So then the
11 defense is putting on evidence and challenging their evidence,
12 showing that they were actually trying to buy *Maxim Magazine*.

13 The second theory is, they were never trying to buy
14 *Maxim Magazine* and the misrepresentation is something else,
15 that the stocks are forthcoming or this will be collateralized
16 by something else. And then that is a different defense. That
17 is a different trial in a different case, each of which has a
18 lot of -- the Venn diagrams --

19 THE COURT: Why can't the government try both of those
20 cases? We think he misrepresented his ultimate intention, but
21 we also think that, in any event, he made various
22 misrepresentations along the way, so to speak.

23 MS. CHAUDHRY: If that's their theory, that would be
24 extremely helpful. Then we know how to defend that. The
25 discovery they have given us actually makes the indictment even

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1 more confusing, because I can't really tell where they are
2 going with it.

3 THE COURT: Let me take a look, which I really should
4 have done before we convened, at the indictment and see what it
5 says in that regard, because it is a fairly detailed indictment
6 as these things go.

7 Here. This is paragraph 8, "The purpose of the
8 magazine scheme was to induce the lenders into loaning millions
9 of dollars to the media company in order to finance the media
10 company's purchase of the magazine." So there, really, you have
11 the answer to number 1, even though I ruled you weren't
12 entitled to it on a bill of particulars, but there it is in the
13 indictment.

14 "In lending money and engaging in negotiations
15 regarding such loans, the lenders relied, at least in part, on
16 material misrepresentations made by Newkirk including, among
17 other things, that the executive who Newkirk claimed to
18 represent as legal counsel was providing financing and
19 collateral for the loans for the media company's purchase of
20 the magazine. In truth and in fact, Newkirk and CC1 never
21 obtained authorization from the executive to promise the
22 executive's financial backing or the posting of the executive's
23 personal assets as collateral of loans from the lenders." That
24 was part of the overview. Then they go on to specify
25 particular representations regarding victim 1, victim 2, victim

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1 3, etc.

2 So at least there they are not opining one way or the
3 other as to whether or not they intended to not purchase the
4 magazine. So if it is not in the indictment, I am not sure
5 that they have to commit one way or the other. What they have
6 to show, according to the indictment, I will read it again,
7 "The purpose of the magazine scheme was to induce the lenders
8 into loaning millions of dollars to the media company in order
9 to finance the media company's purchase of the magazine." And
10 then they go on to say that those monies were obtained through
11 false representations. I don't see anywhere on the face of the
12 indictment -- but I will ask the government to correct me if I
13 have missed it -- the allegation that they also never intended
14 to purchase the magazine and represented falsely that they
15 were.

16 MR. ADAMS: Your Honor, you are correct. It is not
17 specifically laid out as Ms. Chaudhry has said. The attempted
18 purchase was stopped at a certain point before the culmination
19 of the deal, so we don't really know what exactly was going to
20 happen.

21 THE COURT: So now you have your answer.

22 Anything else you wanted to raise about this?

23 MS. CHAUDHRY: I'm sorry, on that particular, no.

24 THE COURT: The only other thing we need to do is set
25 a trial date.

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1 MS. CHAUDHRY: Actually, your Honor, you didn't rule
2 on number 5.

3 THE COURT: Oh. Sorry. "Please specify when the
4 government believes Mr. Newkirk knew that the executive, i.e.,
5 Calvin Darden, Sr., was not actually providing collateral for
6 the loan."

7 I didn't understand that, forgive me, even as a matter
8 of English. The date on which someone knew that something
9 wasn't happening? That is like saying -- I assume the
10 government is taking the position that he never knew that there
11 were real loans.

12 MR. ADAMS: I think, as I understood the request, it
13 was a question of whether Mr. Newkirk knew that Calvin Darden,
14 Sr., had been either fooled or that these loans -- collateral
15 was being hidden from him; and, if so, when he found out. This
16 is actually specifically alleged in the indictment.

17 THE COURT: Why don't you point me to that?

18 MR. ADAMS: "Mr. Newkirk is alleged to have had
19 conversations" --

20 THE COURT: Where are you reading from?

21 MR. ADAMS: I'm sorry, I am at 21 and 22. This is
22 page 9 of the indictment. You will see here.

23 THE COURT: Hold on a minute. I will just read it.

24 (Pause)

25 THE COURT: 21 says, in effect, that after Newkirk had

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1 falsely assured the executive that he would not be a guarantor,
2 Newkirk continued to represent that the executive would
3 guarantee.

4 This has been helpful. So what the defense is saying
5 is, so he might have made representations that were not false
6 before the representation to the executive that is in the
7 indictment, like you will be a guarantor or I understand you
8 will be a guarantor, or anything like that, and then later on,
9 no, you are not going to be a guarantor, and it is only at that
10 point that the representations to the victims that, yes, he is
11 a guarantor become false.

12 Is that the way the government intends to go on this?

13 MR. ADAMS: Not exactly, your Honor. These are
14 allegations that make it clear, at least as of these dates,
15 Mr. Newkirk very clearly is making false statements about the
16 collateral not being --

17 THE COURT: You think you could push it back earlier.

18 MR. ADAMS: Yes, sir. There are also allegations in
19 here that Mr. Newkirk was aware throughout the course of the --

20 THE COURT: I think that is classic evidentiary
21 detail, and I see actually no reason why the defense is
22 entitled, other than as strategic value, to have that specific
23 date. The jury maybe presented with several different options
24 there, all of which the government can argue, all of which the
25 defense can oppose, and all of which would involve a wealth of

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1 evidentiary detail that ought to be before them and not cabined
2 by any bill of particular determination. Again, it doesn't
3 relate to any rulings I am going to have to make, so that
4 request is also denied.

5 Did you want to say something else?

6 MS. CHAUDHRY: Yes. The reason I asked for that is
7 the government's maybe second discovery letter, the letter that
8 accompanied their discovery, had a statement saying, We are
9 including false bank statements of Calvin Darden, Sr.'s, and we
10 have a witness that will say that Mr. Newkirk did not know that
11 these statements were false.

12 THE COURT: Okay.

13 MS. CHAUDHRY: That was part of tying into when are
14 they saying he joined the conspiracy, then, if --

15 THE COURT: Who is the witness? I will ask the
16 government that. Mr. Prosecutor?

17 MR. ADAMS: Yes, your Honor, if I could just review, I
18 brought the discovery letters. If I can just review that for
19 one second.

20 MS. CHAUDHRY: I think it is the second one.

21 MR. ADAMS: Do you have a date?

22 MS. CHAUDHRY: May 4.

23 THE COURT: This is presumably a *Brady* disclosure,
24 yes?

25 MR. ADAMS: One moment, your Honor, I think it is a

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1 different letter.

2 THE COURT: I see. All right.

3 MS. CHAUDHRY: I'm sorry, it is the first one.

4 MR. ADAMS: Your Honor, what we wrote in the discovery
5 letter, for the record, is, "Please be aware that an individual
6 who the government may call as a witness in this matter, who I
7 will call witness 1, has previously informed the government in
8 substance and in part that:

9 "1. Newkirk and witness 1 discussed the need to
10 obtain the signature of Calvin Darden, Sr., for certain
11 documents relating to the attempted purchase of *Maxim Magazine*
12 and related assets and that witness 1 informed Newkirk that
13 Calvin Darden, Sr., would never sign such documents; and

14 "2. Newkirk was not initially aware of the falsity or
15 forgery of bank statements purporting to reflect that of Calvin
16 Darden, Sr., at the time such documents were provide today a
17 potential lender in the course of the attempted purchase of
18 *Maxim Magazine* and the related assets."

19 THE COURT: So that was presumably a *Brady* disclosure.
20 So who is the witness?

21 MR. ADAMS: Who is?

22 THE COURT: Who is the witness.

23 MR. ADAMS: Likely to the Calvin Darden, Jr., if we
24 choose to call him.

25 THE COURT: So you have that now. That actually

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1 wasn't what you were seeking to obtain through your formal
2 motion, but you got it anyway.

3 So now I think we are ready to set a trial date, are
4 we not?

5 MS. CHAUDHRY: I have another couple of issues to
6 raise.

7 THE COURT: Okay. Go ahead.

8 MS. CHAUDHRY: Just, we see each other so rarely, I
9 figured I would take as much time as we could.

10 So, your Honor, I am aware that yesterday was my date
11 to submit all motions. An issue has come up, and I can tell
12 you the issue first and then how it came up yesterday, just to
13 trigger to the court that there may be additional things we
14 need to do that we did not expect to do.

15 The issue is this: A huge part of this case is about
16 Harvey Newkirk, as a lawyer, working at Bryan Cave, working on
17 this *Maxim* deal, and the deal was a fraud. Both reading the
18 indictment and the discovery and having had some conversations
19 with Bryan Cave, a big part of the government's case is he was
20 also defrauding Bryan Cave, and he knew from the outset that
21 this was a fraud. He was lying to the law firm about who his
22 client was, what was really going on, and I expect that
23 there --

24 THE COURT: Who is the "he" in that sentence?

25 MS. CHAUDHRY: Mr. Newkirk.

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1 THE COURT: Mr. Newkirk was lying.

2 MS. CHAUDHRY: That Mr. Newkirk was lying to his own
3 law firm --

4 THE COURT: You are saying this is part of the
5 government's theory.

6 MS. CHAUDHRY: Yes, it is part of their theory, and a
7 big part of their case, that he was achieving this big fraud by
8 being part of this big law firm, having partners and associates
9 work with him, and the other --

10 THE COURT: What law firm was he working at?

11 MS. CHAUDHRY: Bryan Cave.

12 The evidence in this case will show that a lot of
13 lawyers for Bryan Cave were working on this exact matter with
14 Mr. Newkirk and part of our theory of defense is that there was
15 nothing in it for Bryan Cave; it was all open and notorious;
16 that Mr. Newkirk is another victim of Calvin Darden, Jr.'s.

17 We had approached Bryan Cave in April, right when
18 Mr. Newkirk was indicted, about payment of legal fees, and we
19 had been in discussion with them, and they sort of led us along
20 until May, when they finally told us that they will not be
21 paying fees. So then we were drafting a complaint, and so
22 Mr. Newkirk was in our office, we had been in communication
23 with Bryan Cave's lawyers, and the issues we are bringing up in
24 that complaint is their duty to defend and their duty to keep
25 defending Mr. Newkirk, and that's the first time we learned, in

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1 connection with drafting our complaint against Bryan Cave, that
2 Bryan Cave actually represented Mr. Newkirk when the government
3 first came to investigate this case. They had a white collar
4 litigation partner sit down and meet with Mr. Newkirk and go
5 with him to meet with the agents. That partner stepped outside
6 the room with Mr. Newkirk when he had questions, answered his
7 questions, and we are aware that it is Bryan Cave's policy to
8 usually self-represent itself in litigation and matters.

9 So Mr. Newkirk was never given any sort of *Upjohn*
10 warnings that, We are representing the firm and not you. In
11 fact, he was told, We will stand beside you. We are all in
12 this together. He spoke with them, he met with them, and they
13 have since thrown him under the bus.

14 We now believe, having learned this, that Bryan Cave
15 may have turned over documents that are privileged, that
16 contain information that Mr. Newkirk gave them, believing that
17 they were his lawyers, and that they may have turned that over
18 to the government. I don't know the extent --

19 THE COURT: Out of this scenario you just read, you
20 might have a motion, but you are not sure yet.

21 MS. CHAUDHRY: Yes. I can't describe every --

22 THE COURT: I can see that possibility. So we will
23 give you an opportunity to bring such a motion if you wish. We
24 will factor that into the schedule we are about to set.

25 MS. CHAUDHRY: One small thing to also factor in is, I

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1 would like to ask the government for the entire file they got
2 from Bryan Cave; and, if the government is going to refuse, I
3 would like to ask them to refuse quickly, so I can put that in
4 the motion.

5 THE COURT: Maybe the assistant can provide some help
6 here to narrow this. Documents received from Bryan Cave by
7 subpoena or voluntary?

8 MR. ADAMS: By subpoena originally. There have
9 been -- they are still subject to the original subpoena, and I
10 would consider essentially everything that they have given
11 me --

12 THE COURT: Okay, so pursuant to a subpoena.

13 MR. ADAMS: Yes.

14 THE COURT: And they did not indicate any claim of
15 privilege.

16 MR. ADAMS: To rewind to the original situation, it
17 was not clear to Bryan Cave exactly who their client was as a
18 result of this fraud. There were discussions of privilege and
19 things were withheld on that basis.

20 THE COURT: The client that defense counsel is talking
21 about is the defendant.

22 MR. ADAMS: Yes, sir.

23 THE COURT: So normally when there is a lawyer from a
24 firm who is representing an individual, it is implicit and
25 often explicit that first he is to determine there is no

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1 conflict between the two; and, second, that he is representing
2 both because, in any criminal investigation, the firm will have
3 an involvement as well as any individual. So assuming he was
4 representing both, then of course there could be no privilege
5 objection, because if either party to a joint representation
6 waives the privilege, the privilege is waived.

7 However, if the defendant reasonably believed that
8 they were only representing him, then there might be the basis
9 for some sort of motion, assuming there was any privileged
10 material.

11 So I guess the question is what was the nature, to the
12 extent that you can generally describe, of the documents
13 received?

14 MR. ADAMS: Originally e-mails that I think there is
15 no question there is no claim of privilege for a variety of
16 reasons. They predate any sort of -- it is from the course of
17 the deal itself. It is not in the context of any sort of
18 internal investigation or investigation after the fact.

19 I have not been given any notes, any paper documents
20 written down by partners or attorneys of Bryan Cave or partners
21 for Bryan Cave that are -- that would be notes or memoranda of
22 any internal investigation.

23 THE COURT: That's where I think most likely a
24 privilege question might arise, if they had disclosed to you,
25 We interviewed the defendant and he told us X.

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1 MR. ADAMS: Your Honor, if I could.

2 THE COURT: There might still be no privilege issue
3 but, at least absent that, it is hard to see whether there
4 would be a privilege issue at all.

5 MR. ADAMS: And just to give you the full picture, I
6 have had discussions in the course of witness preparation with
7 members of Bryan Cave who have described interviews of
8 Mr. Newkirk that took place after he was essentially placed on
9 leave or just before he was terminated with the firm. It is
10 not my understanding that they were having those discussions
11 with him in the context of him as a client.

12 THE COURT: At what point did they represent him, if
13 at, all in this?

14 MR. ADAMS: I think never. I don't believe that they
15 ever represented him.

16 THE COURT: Let me ask defense counsel, when do you
17 think they represented him.

18 MS. CHAUDHRY: Your Honor, I believe when the
19 investigation began from the government. The litigation
20 department -- this is a corporate deal. The litigation
21 department came in, started counseling all of the people
22 involved in the deal, not just Mr. Newkirk, and that continued
23 and he kept meeting with the firm even after he was --

24 THE COURT: Wait a minute. Now you are claiming
25 something different. You are saying they gathered all the

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1 people who were involved in the detail and they gave them some
2 joint instructions or some joint questions or whatever.

3 MS. CHAUDHRY: I believe they spoke to everybody. I
4 don't know if it was jointly, but I know that every person was
5 spoken to by a litigator, and Mr. Newkirk was spoken to
6 separately by Marybeth Buchanan, who is one of their white
7 collar litigators.

8 THE COURT: That sounds like an internal investigation
9 by the law firm.

10 MS. CHAUDHRY: Except she then prepped him for his
11 meetings with the agents, and she advised him to meet --

12 THE COURT: Who is "she," by the way?

13 MS. CHAUDHRY: Marybeth Buchanan.

14 And then she advised him to meet with the government
15 and went with him and stepped out with him and answered
16 questions during the meeting.

17 MR. ADAMS: And I can tell you I have no notes from
18 Ms. Buchanan or anyone at Bryan Cave relating to that.

19 THE COURT: And the agents have not told you verbally
20 what occurred there?

21 MR. ADAMS: Well the agents interviewed Mr. Newkirk.
22 I have their notes, and those have been provided to defense
23 could you be.

24 MS. CHAUDHRY: Can I ask, I keep hearing that the
25 government has no notes. Were they verbally, was the

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1 government verbally informed? Often the government will meet
2 with someone and say, Don't give me your notes, just read what
3 they say or tell me what happened.

4 MR. ADAMS: And, in full candor, with respect to an
5 interview that took place after he was placed on leave, yes. I
6 don't have notes from it, but I have been given sort of a --

7 THE COURT: Let me just go back. An interview that
8 occurred after he was placed on leave, an interview of the
9 defendant by whom?

10 MR. ADAMS: By partners at Bryan Cave in the
11 context -- it's my understanding that this was in the
12 context --

13 THE COURT: And you said to the partners, Don't give
14 me the notes, but tell me what was said.

15 MR. ADAMS: The partners consider -- I think they
16 consider the piece of paperwork product privilege. They were
17 not willing to read me what was on the piece of paper. I did
18 get a proffer of what Mr. Newkirk said, as opposed to what
19 their impressions as work product were. But it's not their
20 position that it was attorney/client.

21 THE COURT: Are those statements being introduced?

22 MR. ADAMS: Potentially, your Honor. I got these
23 statements on Wednesday. I have not provided them as of today.

24 THE COURT: So it sounds like we are down to those
25 statements.

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1 MR. ADAMS: I'm sorry, sir. Just the very last piece,
2 so that we have got everything on the table. At some time well
3 after the fact, I think even after Mr. Newkirk was formally
4 terminated, although potentially just before that, but around
5 July of 2014, an associate, in the context of responding to
6 some sort of civil discovery demand served on Bryan Cave, and I
7 think directly on Bryan Cave as either a party or a third
8 party, again called Mr. Newkirk in order to get information
9 relevant to this third-party subpoena, and Mr. Newkirk provided
10 some information there. Again, that wasn't made at the request
11 of law enforcement or to law enforcement.

12 THE COURT: That was at the point where he already had
13 his own counsel?

14 MR. ADAMS: I don't believe so. Again, I think at
15 that point for sure he was out of the firm as an employee is my
16 understanding.

17 THE COURT: But that doesn't mean he might not have
18 been under the reasonable impression he was still being
19 represented by the firm.

20 So it sounds like there were a few statements in the
21 second category that the government is about to turn over, I
22 gather, yes, the ones you just got on Wednesday.

23 MR. ADAMS: Your Honor, to be honest, I don't consider
24 them Rule 16. I consider them 3500 material.

25 THE COURT: Turn them over.

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1 MR. ADAMS: Yes, sir.

2 THE COURT: And then the last item was in a memo form.

3 MR. ADAMS: No. In witness preparation, Mr. Newkirk's
4 statements were related to me.

5 THE COURT: By the associate.

6 MR. ADAMS: By the associate. I did not receive a
7 piece of paper.

8 THE COURT: Are those statement you are planning to
9 offer in evidence?

10 MR. ADAMS: One of those statements, yes.

11 THE COURT: So I think the statement that you are
12 planning to offer in evidence, you need to provide that to the
13 defense.

14 MR. ADAMS: Yes, sir.

15 THE COURT: Now we know the scope of possible
16 suppression, if there is any basis for suppression, as well.

17 I will not accept a motion to suppress on this ground
18 unless there is an affidavit from the defendant personally
19 setting forth the bases on which he believed he was -- both the
20 fact that he did believe he was being solely represented, not
21 jointly represented, and the basis on which he so believed, and
22 then you can make your legal argument as well in an
23 accompanying memo of law. But, as you know, under Second
24 Circuit law, a suppression motion requires the affidavit of the
25 defendant.

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1 Anything else we need it take up?

2 MS. CHAUDHRY: Yes, your Honor. I would also like to
3 ask the government for all of its correspondence with Bryan
4 Cave. I believe that is both relevant and something that we
5 need now in order for us to both investigate and make motions,
6 because it is unclear to me what was actually asked and also I
7 have a sense from my litigation already with Bryan Cave that
8 they are being pretty cooperative with the government via
9 subpoena. They are not going to be cooperative with us.

10 THE COURT: I would call that standard practice.

11 MS. CHAUDHRY: They are going to claim privileges,
12 they are going to be uncooperative, and we don't want to be in
13 a position where we have a witness everybody expects at trial
14 to testify who has made statements not to government agents but
15 to an internal investigation that's been turned over.

16 THE COURT: I don't see how that -- I don't know if
17 the correspondence is voluminous or short, but I think the
18 relevant thing is that the government's position is that all of
19 this was pursuant to a subpoena, so you should get a copy of
20 the subpoena, but I don't see why the correspondence would be
21 something you are entitled to.

22 MS. CHAUDHRY: I was just wondering what --

23 THE COURT: That also presumably would be government
24 work product.

25 MS. CHAUDHRY: Letters the government sent to Bryan

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1 Cave?

2 THE COURT: Yes, if they reflect the government's
3 theories.4 MS. CHAUDHRY: But they have already published it to a
5 third party.6 THE COURT: I'm sorry. For these purposes Bryan Cave
7 is being treated as, in effect, an adjunct of the government.
8 And indeed, that's basically what you are telling me they are.
9 But, anyway, for now; we can revisit the correspondence if you
10 have something more particularized to offer. I think for now
11 just a copy of the subpoena is sufficient.12 Assuming the government gets all that stuff to you by,
13 say, Tuesday of next week, how long do you want to make any
14 motion?15 MS. CHAUDHRY: I don't have my calendar. What date is
16 Tuesday of next week?

17 MR. ADAMS: I believe it is the 16th.

18 THE COURT: Tuesday of next week is June 16.

19 MS. CHAUDHRY: Two weeks after that would be great.

20 THE COURT: I'll bet it would, but how about ten days,
21 June 26.

22 MS. CHAUDHRY: Okay.

23 THE COURT: And how long does the government want to
24 respond? You have a choice: Ten days from the 26th would be
25 July 6, but there is some obscure holiday somewhere in that

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1 period, so you have the choice of July 8, July 7, July 6, July
2 3, July 2, July 1. Which one would you like?

3 MR. ADAMS: If July 8 was on the menu, I'll take that.

4 THE COURT: I thought you might. So July 8. Do you
5 want to put in reply papers or just have oral argument?

6 MS. CHAUDHRY: If we do, we won't need more than two
7 days.

8 THE COURT: So reply papers by July 10. We can
9 schedule oral arguments after the papers. If I think it is not
10 necessary, we can always cancel it. Let's at least have it on
11 the schedule. How are we fixed for July 16?

12 MS. CHAUDHRY: Your Honor I am beginning a trial
13 before Judge Garaufis in the Eastern District on July 13. It
14 should not last more than two weeks. It should be maybe ten
15 days.

16 THE COURT: I think I am going to dispense with oral
17 argument then; or, I will put it this way, I am not going to
18 set a date for it. If, after I look at the papers, I can
19 decide it without oral argument, fine. If oral argument is
20 necessary, then of course it will be after your trial, but I
21 don't want to put it off and you shouldn't want me to put it
22 off if it can be decided earlier.

23 Now let's talk about a trial date. So given all of
24 this new development, my plan to try it next Monday has gone by
25 the boards, but how long a trial is the government

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1 contemplating?

2 MR. ADAMS: Your Honor, we expect seven trial days or
3 thereabouts.

4 THE COURT: Defense counsel agrees with that?

5 MS. CHAUDHRY: I would say seven to ten.

6 THE COURT: So we will put aside two weeks. That may
7 be more than necessary, but we will put aside two weeks. How
8 about August 3?

9 MR. ADAMS: Fine with the government.

10 MS. CHAUDHRY: Your Honor, my other trial will be
11 ending right before then. Is it possible to do it later in
12 August?

13 THE COURT: How about August 17?

14 MS. CHAUDHRY: That would be fine for me. Given
15 your -- previously you said you wanted to try this case in
16 August. Ms. Farber from my office has a conflict, so John
17 Harris from my office will be trying it with me. He is
18 scheduled to be out of the country August 24 to September 7.
19 We are happy to start September 10, which is long enough to get
20 from JFK back here.

21 THE COURT: Unfortunately I have commitments through
22 most of September. How about August 31?

23 MS. CHAUDHRY: That's right in the middle of when he
24 is not in the country.

25 THE COURT: Give me the dates again.

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1 MS. CHAUDHRY: August 24 through September 7. I think
2 Labor Day is in the middle of that, so those days weren't
3 really --

4 THE COURT: What's the story on your present
5 colleague?

6 MS. CHAUDHRY: Beth Farber has a murder trial in this
7 courthouse that is scheduled to start in the beginning of
8 August and take like three weeks that she is trying with Avi
9 Moskowitz.

10 THE COURT: How many people in your firm?

11 MS. CHAUDHRY: Oh, total maybe 20 lawyers.

12 THE COURT: All of whom presumably are dying to try a
13 case.

14 MS. CHAUDHRY: Actually all of whom are trying cases
15 right now.

16 THE COURT: Right now is fine but we are talking
17 about -- I have given you three possibilities in August and you
18 have said no. I don't want to be harsh, but I have to be
19 concerned. This is a criminal case. September 10 does not
20 work for the court. I have trials basically throughout
21 September. I have a one-month trial in a criminal case
22 beginning October 5. So it is either going to be one of those
23 dates in August or it is going to be October 26. And if we do
24 it on October 26, we would sit on the 26th, 27th, 28th but only
25 half day on the 29th, only a half day on the 30th, and if it

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1 went into the next week, only a half day on the 4th. So that's
2 not as ideal from many standpoints as August, but let me hear
3 which one defense counsel prefers.

4 (Defense counsel and defendant confer)

5 MS. CHAUDHRY: Your Honor, I would prefer my
6 co-counsel to be able to attend the whole thing, so even though
7 it is not ideal, I would prefer October. And if your other
8 trial goes away and you want us to come earlier, we will come
9 earlier.

10 THE COURT: What's the government's view.

11 MR. ADAMS: I have no -- well, the October date is
12 acceptable. I would just ask that if it is going to be set, so
13 that I can work with witnesses who are attorneys and busy, that
14 we not be in a situation where if we say October and then two
15 weeks from now it turns out it is back in August.

16 THE COURT: I agree. I like firm, fixed, and final
17 dates rather than moving targets. What I am concerned about is
18 the speedy trial rule and not in the technical sense, because I
19 think this qualifies for exclusion under the Speedy Trial Act
20 because co-counsel for the defense are otherwise occupied and
21 counsel for the defense as well between the various dates. But
22 just the spirit of the speedy trial rule, it is unusual that I
23 put a criminal case off this long. But if both sides want it,
24 I saw that defense counsel consulted with her client before
25 making her answer, correct?

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1 MS. CHAUDHRY: I did.

2 THE COURT: And given all of those commitments from
3 what is clearly going to be a very busy and undoubtedly rich
4 law firm, we will convene the trial on October 26. Look at my
5 individual rules, because there are a bunch of things you have
6 to get me the week before.

7 How long before trial does the government want to turn
8 over 3500 material?

9 MR. ADAMS: Your Honor, given the nature of some of
10 it, I am happy to do it earlier than we normally do, a week
11 before trial, if that's acceptable.

12 THE COURT: Yes, that's what I was going to suggest as
13 well, a week before trial.

14 So pursuant to Section 3161 of Title 18, I will
15 exclude from calculations under the Speedy Trial Act all time
16 between now and October 26, finding that, for the reasons
17 previously mentioned, as well as the overriding principle that
18 even lawyers are entitled to vacations, and for all the reasons
19 apparent from this transcript, the best interests of justice in
20 excluding such time substantially outweigh the interests of the
21 public and the defendant in a speedy trial.

22 Anything else we need to take up?

23 MR. ADAMS: Nothing for the government.

24 MS. CHAUDHRY: One small issue regarding permission
25 from the court for Mr. Newkirk to travel out of where he is

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1 currently allowed to go. If I am permitted to send a letter to
2 the court requesting, I am happy to do that.

3 THE COURT: Yes, but consult first with the
4 government.

5 MS. CHAUDHRY: I will.

6 THE COURT: See if they are in disagreement or not.

7 MS. CHAUDHRY: I just wanted permission to send a
8 letter to the court.

9 THE COURT: All right. Very good. Thanks so much.

10 MR. ADAMS: Thank you.

11 MS. CHAUDHRY: Thank you.

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